Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1072

DANIEL VALERIANO,

Petitioner.

—v.—

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI

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Opinions Below

Defendant was convicted, after a jury trial, of conducting an illegal gambling business in violation of Title 18, U.S. Code, Sec. 1955 and of conspiracy to violate Sec. 1955. There was no written opinion in relation to defendant's conviction. The District Court filed a written, but unpublished, opinion, denying defendant's pretrial motion to suppress, for failure to file a timely inventory, evidence obtained through use of a wiretap authorized under 18 U.S.C.§2518, *United States* v. *Valeriano, et al.*, —— F. Supp. —— (D. Conn. February 18, 1976) Dkt. No. Crim. N-74-48), App. p. 1a, *et seq.* An oral opinion was rendered by District Judge Zampano on defendant's motion, made during his trial, to suppress results of a pen register placed on his telephone. App. p. 16a, *et seq.* On appeal, the Court of Ap-

peal rendered an unrecorded oral opinion, *United States* v. *Valeriano,* (2nd Cir. January 7, 1977) (Dkt. No. 76-1417).

Jurisdiction

This is a petition for a writ of certiorari directed to the United States Court of Appeals for the Second Circuit, seeking review of a judgment entered on January 7, 1977, affirming defendant's criminal conviction. Jurisdiction to review the judgment by writ of certiorari is granted under Title 28, U.S. Code, Section 1254 (1).

Questions Presented

1. Did the trial court err in refusing to suppress the results of a pen register where the Government investigators only obtained a court order authorizing a wire tap and did not obtain a court order specifically authorizing the installation of a pen register on defendant's telephone?

2. Did the trial court err in refusing to suppress the results of a wiretap, where the inventory, although served on defendant within time extensions granted by the District Judge, was not served within 90 days of the termination of the surveillance?

Statutes Involved

"Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

18 U.S.C. Sec. 2510 (4).

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. Sec. 2515.

Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately

terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named on the application.

18 U.S.C. Sec. 2518(7).

Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in

the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

18 U.S.C. Sec. 2518(8)(d).

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to poolselling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenues in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection

(c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

18 U.S.C. §1955.

Statement of Case

This is an appeal from the affirmance of defendant-petitioner's conviction for conducting an illegal gambling business and for conspiracy to conduct such a business.

On January 15, 1973, prior to defendant's indictment, application was made by the United States to U.S. District Judge Thomas F. Murphy, for an order authorizing the interception of wire communications from the telephone (624-8802) subscribed to by defendant and from a different phone subscribed to by another individual. The application relied for probable cause upon the affidavit of Special Agent Raymond Connolly. Judge Murphy issued an order authorizing the wiretapping of the two telephones for a period of fifteen (15) days, for the purpose of determining the manner in which Daniel Valeriano, Charles Furman, Frank Gunn, Catherine Brown, an individual known only as "Alfie", and unknown others, conducted an alleged "policy" operation. The application did not seek the use of a pen register on any telephone and the order did not provide therefor.

The wiretaps were established on January 16, 1973 and terminated on January 27, 1973. A pen register device was also employed during that period. The original tape record-

ings were sealed by District Judge T. Emmet Clarie, on January 29, 1973.

The initial 90 day time limit on the service of inventory would have expired on April 30, 1973. On April 25, 1973, however, the Government received a 30 day postponement from District Judge Jon O. Newman (Judge Murphy was in Mexico at the time). On May 22, 1973, Judge Murphy authorized an additional 45 day postponement. Inventory was served on five individuals, including defendant, on July 10, 1973.

Defendant was indicted on May 3, 1974 on two counts by a federal grand jury sitting at Hartford and charged with conducting an illegal gambling business in violation of 18 U.S.C. Sec. 1955 and with conspiracy to commit the substantive offense. Jurisdiction rested in that Court by virtue of 18 U.S.C. Section 3231. The crucial evidence against defendant resulted from Government wiretapping and use of a pen register on defendant's telephone line.

Prior to trial, defendant moved for suppression of the aural wiretap evidence on the ground that he had not been served with an inventory within 90 days of the termination of the surveillance, as required by 18 U.S.C. Sec. 2518 (8)(d). The Motion was denied by District Judge Robert C. Zampano, App. 9a-10a. At trial, defendant learned for the first time of the existence of the pen register and moved to suppress the results thereof. That motion was likewise denied by Judge Zampano, App. 16a, *et seq.*

After a jury trial, defendant was found guilty on both counts and, on September 13, 1976, Judge Zampano sentenced him to two years imprisonment on Count One, a two

year suspended sentence on Court Two, and four years probation.

On September 16, 1976, defendant filed a notice of appeal. On January 7, 1977, the United States Court of Appeals for the Second Circuit affirmed his conviction in open court.[1]

This petition for a writ of certiorari followed.

ARGUMENT

1.

The results of the aural interception should have been suppressed, since the inventory was not served within 90 days of the termination of the wiretap authorization.

This case raises an important question left unresolved in this Court's recent opinion in *United States* v. *Donovan*, —— U.S. ——, 45 U.S.L.W. 4115 (January 18, 1977). In that case, this Court held that the failure to provide an inventory to persons whose conversations were overheard during a tap, *but who had not been initially been identified as targets of that tap,* does not require suppression of the results of that surveillance. The Court reasoned that failure to meet the inventory provision did not violate any statutory requirement "which directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling

[1] Pursuant to the Rules of the Court of Appeals for the Second Circuit, a judgment may be affirmed in open court whenever the panel deciding the case is in unanimous accord as to that disposition and is of the opinion that the filing of an opinion would serve no jurisprudential purpose. Rules, U.S. Court of Appeals, Second Circuit, Sec. 0.23.

for the employment of this extraordinary device." *United States* v. *Donovan,* —— U.S. at ——, 45 U.S.L.W. at 4121, quoting *United States* v. *Giordano,* 416 U.S. 505 at 527 (1974). However, the majority opinion specifically recognized that a different situation might exist where the government "knew before the interception that no inventory would be served." —— U.S. at —— n. 26, 45 U.S.L.W. at 4122 n. 26. The instant case raises an aspect of that reserved question, as well as requiring interpretation of ambiguous language in Section 2518 (8)(d) regarding the scope of the District Judge's authority to grant extensions for the filing of the inventory.

A. *Sec. 2518 imposes an absolute 90 day ceiling on inventory service.*

The relevant portion of Sec. 2518 provides

> "Within a reasonable time *but no later than ninety days after the filing of an application for an order of approval under Sec. 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof,* the issuing or denying judge shall cause to be served, on the persons named in the order or the application, . . . an inventory. . . . On an ex parte showing of good cause to a judge of competent jurisdiction the service of the inventory required by the subsection may be postponed". 18 U.S.C. 2518 (8)(d) (Emphasis added).

The threshold issue requiring consideration by this Court is whether the Court may extend the time for an inventory beyond the 90 day period. The defendant submits that the better reading of the statute requires that the 90 day provision represents a final cut-off date. Any other reading would negate the meaning of that language. Had Congress intended to allow the District Judge to direct service of the inventory more than 90 days after the termination of surveillance, it would have written the statute simply to read "within a reasonable time [an inventory shall be served]". If interpreted as the Government urges and the Courts below held, the statute has just that effect, since the District Judge may merely continue to grant extensions until he reaches what he considers a "reasonable time," which period exceeds 90 days.

Since it is a common practice for the Government to request, and for judges to grant, ex parte orders extending the period for service beyond 90 days, this issue deserves definitive comment by this Court.

B. *If the Government fails to provide a timely inventory, there should be no requirement that a person who is initially the target of a wiretap show prejudice to obtain suppression of the wiretap results.*

If defendant prevails upon the issue discussed above, the Court must consider whether prejudice must be shown by the defendant in order to require suppression of the surveillance results. The Court of Appeals for the Second and Eighth circuits, in cases presently pending before this Court, have held that prejudice must be demonstrated, *United States* v. *Principie,* 531 F. 2d 1132 (2nd Cir.), *petition for cert. filed,* April 1, 1976 (Dkt. No. 75-1393); *United States* v. *Civella,* 533 F. 2d 1395 (8th Cir. 1975) *petition for cert. filed,* April 14, 1976 (Dkt. No. 75-1813).[2] This is

[2] Defendant submits that prejudice in fact exists although no formal proof was not made thereof. The record shows that a second wiretap was authorized on May 22, 1973, more than ninety days after the termination of the first surveillance, i.e. after the time when an inventory originally would have been required absent extensions, but before the inventory was actually served on July 10, 1973. Defendant submits that had the inventory been given within 90 days, the telephones which were tapped under the

an important unresolved issue in the context raised by this case. *United States* v. *Donovan,* —— U.S. ——, 45 U.S.L.W. 4115 (January 18, 1977), in holding that the failure to file an inventory does not invalidate the surveillance *ab initio,* relies upon argument that the violation of the statute subsequent to the commencement of surveillance is irrelevant to the legislative intent of minimizing the number of wiretaps, since the tap would have been commenced regardless of the error. Defendant submits that this case differs significantly from *Donovan* in that the person here denied a timely inventory was one of those named in the initial application, while in *Donovan,* the failure occurred as to someone whose existence was unknown at the time the tap began. Thus, this case is analogous to that suggested by the Government in its brief in *Donovan,* where "the agents knew before the inception that no inventory would be served." —— U.S. at —— n. 26, 45 U.S.L.W. at 4122 n. 26; here, as in that footnoted situation, the Government may well have already intended to request extensions to file an inventory beyond 90 days. Since proof of such an intention would border on the impossible, defendant submits that this Court should adopt a prophylactic rule and require suppression where a timely inventory is not given to one of the initial targets of the wiretap.

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second order clearly would not have been used for the transmission of alleged gambling information subsequent to receipt of the inventory and the evidence produced through the second tap would not have been obtained.

2.

Placing a pen register on a telephone without prior court order violated defendant's due process rights and requires suppression of the products of the register.

Certain facts in this matter are uncontested. After the Government obtained its wiretap authorization on January 15, 1973, it placed on the defendant's telephone, in addition to an aural recording device, a pen register, although the order obtained made no reference to the use of the latter device.[3] This practice, which has been followed in other investigations, see *United States* v. *Falcone,* 505 F. 2d 478 (3rd Cir. 1974), *cert. denied,* 420 U.S. 955 (1975); *United States* v. *Lanza,* 341 F. Supp. 405 (M.D. Fla. 1972), clearly raises an important question as to whether pen register results so obtained must be suppressed in order to avoid repetitions of such misconduct. *Stone* v. *Powell,* —— U.S. ——, 96 S. Ct. 3037, 3051 (1976).

In the courts below, the Government sought to justify its actions on two grounds. First, it argued that the pen

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[3] The following definition of a "pen register" is found in *United States* v. *Caplan,* 255 F. Supp. 805, 807 (E.D. Mich. 1966):

> "The pen register is a device attached to a given telephone line usually at a central telephone office. A pulsation of the dial on the line to which the pen register is attached records on a paper tape dashes equal in number to the number dialed. The paper tape then becomes a permanent and complete record of outgoing numbers called on the particular line. With reference to incoming calls, the pen register records only a dash for each ring of the telephone but does not identify the number from which the incoming call originated. The pen register cuts off after the number is dialed on outgoing calls and after the ringing is conducted on incoming calls without determining whether the call is completed or the receiver is answered. There is neither recording nor monitoring of the conversation."

register does nothing that could not also be done by an expert user of an aural intercept. The Court of Appeals for the Third Circuit, *United States* v. *Falcone,* 505 F. 2d 478 (3rd Cir., 1974), *cert. denied,* 420 U.S. 955 (1975) and, in this case, the Second Circuit have accepted the Government's view.

Defendant submits that an important question is raised as to whether this technical assumption can be made without the defendant being given an opportunity to challenge its validity. A pen register is a very complicated mechanical device which operates on the basis of increases and decreases in electrical frequencies. See *United States* v. *Focarile,* 340 F. Supp. 1033 (D. Md.), *aff'd sub nom. United States* v. *Giordano,* 469 F. 2d 522 (4th Cir. 1972), *aff'd,* 416 U.S. 505 (1972), for a description of the operation of a pen register. The Government, having elected to place a pen register without specific Court approval, should not be permitted to justify it merely by stating *ex post facto* that it performs no new and different function.

The Government secondly justified the use of the pen register by stating that the District Court judge, by granting permission for an aural interception under Sec. 2518, had already found "probable cause" for its installation. Since the Government never informed the District Judge of its intention to use a pen register, its argument below essentially is that it has a right to extend a court's finding of probable cause in one context to encompass any other material which it considers somehow related. Defendant submits that the decision must be made by the District Judge, not the Government. *Cf. Katz* v. *United States,* 389 U.S. 347, 354-59 (1967).

There must be a showing of probable cause in order to obtain a pen register. *United States* v. *John,* 508 F. 2d 1134 (8th Cir.), *cert. denied,* 421 U.S. 962 (1975).[4] The Government here did not give the Court an opportunity to make that finding as to the propriety of specific device involved. Since the Court order is intended to limit Government interference, the Government should not be permitted to decide on its own the scope of that order. The Fourth Amendment requires that "a neutral and detached authority be interposed between the policy and the public." *Berger* v. *New York,* 388 U.S. 41, 54 (1967); *Accord, Johnson* v. *United States,* 333 U.S. 10 (1948).

CONCLUSION

This Court has been called upon in the past to determine major issues related to the interpretation of the wiretap provisions of the Omnibus Crime Control and Safe Streets Act. *United States* v. *Donovan,* —— U.S. ——, 45 U.S.L.W. 4115 (January 18, 1977); *United States* v. *Chavez,* 416 U.S. 560 (1974); *United States* v. *Giordano,* 416 U.S. 505 (1974); *United States* v. *Kahn,* 415 U.S. 143 (1974). This case provides an opportunity to resolve two of the remaining important questions involved in application of that major legislation—whether the District Court may extend the time for service of the inventory beyond 90 days and whether permission under Sec. 2518 for an aural interception limits the Government's activities to the terms of the District Court order.

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[4] The Government did not contest this issue in the Court of Appeals.

In order to resolve these issues, defendant requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, United States Supreme Court, Rule 19(1)(b).

Respectfully submitted,

Defendant, Daniel Valeriano

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APPENDIX

APPENDIX

Opinions Below

DISTRICT OF CONNECTICUT

Criminal No. N-74-48

UNITED STATES OF AMERICA

v.

DANIEL VALERIANO, CHARLES FURMAN, CATHERINE BROWN, a/k/a Catherine Jones, CLIFTON ADAMS, ELLSWORTH BELL, FRANK KINSLER, FRANK AMENDOLA, a/k/a "Alfie"

MEMORANDUM OF DECISION

In this two-count indictment filed on May 3, 1974, the seven defendants are charged with violating and with conspiring to violate the federal gambling statutes, 18 U.S.C. §§ 1955 and 371. As is typical in § 1955 cases, the defendants level broad constitutional and statutory attacks against the indictment and wiretap evidence obtained under the provisions of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520. In addition, defendant Brown moves to suppress her grand jury testimony, and defendant Bell challenges the search of his home by agents in July, 1973. Finally, the defendants have filed various motions for discovery.

I. The Motions To Dismiss

A. Most of the arguments advanced by the defendants in support of their motions to dismiss are foreclosed by Judge Blumenfeld's reasoned opinion in *United States* v.

Chiarizio, 388 F. Supp. 858 (D. Conn.), aff'd, —— F.2d —— (2 Cir. November 11, 1975). Thus, § 1955 is constitutional; the doctrine of pardon and abatement does not bar the prosecution; and, there is no infirmity in the conspiracy count of the indictment based on an application of "Wharton's Rule." *Id.* at 862-863; see also *United States* v. *Sacco,* 491 F.2d 995 (9 Cir. 1974); *United States* v. *Becker,* 461 F.2d 230 (2 Cir. 1972), vacated on other grounds, 417 U.S. 903 (1974); *State* v. *Genova,* 141 Conn. 565 (1954). Further, since the indictment alleges that the defendants committed certain acts with respect to an illegal gambling business "involving a numbers or policy operation" during a specific period, the use of the term "bookmaking" does not render the indictment vague or legally insufficient. Cf. *United States* v. *DeCesaro,* 54 F.R.D. 596, 597 (E.D.Wis. 1972). The indictment contains the requisite specificity to enable the defendants to prepare their defenses and to avoid the danger of being prosecuted again for the same conduct. *United States* v. *Debrow,* 346 U.S. 374 (1953).

B. As a further ground for dismissal, the defendant Kinsler severely criticizes the role of a prosecutor in presenting evidence to a grand jury and suggests that the Magistrate's duties be expanded to include that "of the court's attorney before the grand jury." The defendant's arguments are conclusory in nature, have little or no relevance to the case at bar, and are contrary to controlling law. The government attorney is specifically authorized to appear before a grand jury, Rule 6(d), F. R. Crim. P., and his presence is recognized as essential "to the fact presentation process by which the grand jury reaches its ultimate decision." *United States* v. *Cooper,* 464 F.2d 648, 653,

(10 Cir. 1972). Moreover, "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated," *United States* v. *Calandra,* 414 U.S. 338, 343 (1974); therefore, there is no requirement that the prosecutor submit to the grand jury all of the evidence in the government's file. *Loraine* v. *United States,* 396 F.2d 335, 339 (9 Cir.), cert. denied, 393 U.S. 933 (1968); *Addonizio* v. *United States,* 313 F. Supp. 486, 495 (D.N.J. 1970), aff'd 451 F.2d 49 (3 Cir.), cert. denied, 405 U.S. 936 (1972).

C. Defendants Brown, Adams, and Furman contend that the indictment must be dismissed as against them because there has been an alleged violation of a policy statement issued by the Department of Justice in 1959 which states: "After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling." The short answer to this contention is that there has been no duplication of prosecution here. While it is true that each of the defendants was prosecuted and convicted of "policy playing" on a single day under Connecticut law, Conn. Gen. Stat. § 53-298, the federal statute with which we are concerned prohibits an illegal gambling business of major proportions involving five or more persons, and one in substantially continuous operation for at least 30 days or with a gross reserve of $2,000 in a any single day. Cf. *United States* v. *Ceraso,* 467 F.2d 653, 658 (3 Cir. 1972). Also, the penalties under state and federal law significantly differ: the state statute provides for a maximum of six months imprisonment or $100 fine, or both, while the federal enactment carries a maximum of five years incarceration or $20,000 fine, or both.

In any event, even assuming there has been a breach of a policy set some years ago by the Justice Department, the defendants point to no statute, rule or regulation that has been breached. As Justice Brennan noted in *Petite* v. *United States,* 361 U.S. 529, 533, "the government has reserved the right to apply or not to apply its 'policy' in its discretion."

II. The Motions To Suppress

A. All of the defendants move to suppress the wiretap evidence secured by agents of the Federal Bureau of Investigation. They first allege that the affidavit submitted by Agent Connolly in support of the wiretap application was deficient in that (1) the reliability of the informants was not sufficiently established on the face of the affidavit, and (2) the information set forth was "double hearsay" because it was relayed to Agent Connolly through other law enforcement officers.

It is well established that a magistrate cannot issue a valid search warrant based an an affidavit which contains information supplied to the police by an unidentified informant unless the affidavit states "some of the underlying circumstances from which the officer concluded that the informant . . . was credible or his information reliable.'" *Aguilar* v. *Texas,* 378 U.S. 108, 114 (1964). See also *Spinelli* v. *United States,* 393 US. 410 (1969); *United States* v *Canestri,* 518 F.2d 269 (2 Cir. 1975). In the instant case, the affidavit recites that the "information provided by Informant Number One has been substantiated and found on each occasion to be accurate and reliable", that Informant Number Two "has provided reliable information in the past to Sergeant DeRosa, which information has resulted

in three arrests and convictions in gambling matters", and that Informant Number Three "in the past has provided reliable information which has been confirmed by independent investigation consisting of surveillances, analysis of telephone toll calls and other investigative techniques." These recitals are sufficient to show the trustworthiness of the informants and to justify reliance on their statements. *United States* v. *Sultan,* 463 F.2d 1066, 1068-1069 (2 Cir. 1972); *United States* v. *Dunnings,* 425 F.2d 836, 839 (2 Cir. 1969), cert. denied, 397 U.S. 1002 (1970).

It is true, as the defendants point out, that Agent Connolly did not personally receive the information from the informants. Rather, each informant relayed information to a named police officer who, in turn, transmitted the information to Agent Connolly. While the use of double hearsay in a wiretap application is not to be encouraged, it does not automatically render the affidavit fatally defective. *United States* v. *Fiorella,* 468 F.2d 688, 691-692 (2 Cir. 1972). The test to be applied is whether the information furnished by each informant, taken in the light of the totality of the circumstances, can reasonably be said to be reliable. *Id.* Here, as stated, the informants had previously given accurate information to the police. In addition, the informants with considerable detail related their personal observations of and contacts with the defendants and extensively described admissions of criminal activity by the defendants. The separate accounts of the three informants tend to corroborate each other and independent investigations by local police and federal agents confirmed several material aspects of the informants' reports. Under these circumstances, the affidavit must be deemed sufficient to support a finding of probable cause for the wiretap

order. See *United States* v. *Harris,* 403 U.S. 573 (1971); *Aguilar* v. *Texas,* supra; *Jones* v. *United States,* 362 U.S. 257 (1960); *United States* v. *Welebir,* 498 F.2d 346 (4 Cir. 1974); *United States* v. *Fiorella,* supra; *United States* v. *Steed,* 465 F.2d 1310 (9 Cir.), cert. denied, 409 U.S. 1078 (1972); *United States* v. *Sultan,* supra; *United States* v. *Fantuzzi,* 463 F.2d 683 (2 Cir. 1972); *United States ex rel. Cardaio* v. *Casseles,* 446 F.2d 632 (2 Cir. 1971).

B. The defendants next argue that the wiretap application did not include the requisite "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c). See also 18 U.S.C. § 2518(3)(c). In support of their position, the defendants cite the conclusory language contained in paragraph 3(d) of the affidavit which merely asserts that normal investigative techniques such as physical surveillance and examination of records have failed to uncover sufficient evidence to sustain a prosecution; and, therefore, "the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violations of Title 18, United States Code, Sections 1955 and 371."

This argument overlooks the factual explanation on pages 11 and 12 of the affidavit concerning the difficulties in employing conventional investigative techniques to the present case. Paragraph 10 of the affidavit reads:

> My experience and the experience of other agents of the Federal Bureau of Investigation have shown that even though gambling customers are identified they are

> unwilling to furnish information to law enforcement agents or officials inquiring into gambling activities. This is even more true when the customer is a professional gambler himself. Moreover, interviews and/or Grand Jury subpoenas would only serve to put these individuals on notice of pending investigation and severely reduce the potential success of the investigation. Experience has shown that raids and searches of individuals operating a policy book have not in the past resulted in gathering sufficient physical or other evidence to prove all elements of the offenses particularly when individuals involved in the operation do not physically engage in the action of operating the policy action but control and receive proceeds of the operation. Even when records are maintained these records are frequently destroyed immediately prior to a physical search of the premises and usually records which are obtained are coded in order to protect the names of controllers and runners.
>
> The informants mentioned in this affidavit have informed agents of the Federal Bureau of Investigation and officers of the New Haven Police Department that they categorically refuse to testify in any court proceedings because of possible retaliatory tactics which might be taken against them.

A similar statement was found to be in substantial compliance with the mandates of §§ 2518(1)(c) and (3)(c) in *United States* v. *Askins,* 351 F. Supp. 408, 414 (D.Md. 1972). Further, a comparison of the averments in the Connolly affidavit with narratives upheld in other controlling cases indicates that the defendants' contentions must be rejected. See *United States* v. *Steinberg,* —— F.2d —— (2

Cir. November 10, 1975); *United States* v. *Falcone,* 364 F. Supp. 877, 889 (D.N.J. 1973), aff'd 505 F.2d 478 (3 Cir. 1974), cert. denied, 420 U.S. 955 (1975); *United States* v. *Staino,* 358 F. Supp. 852, 856-857 (E.D.Pa. 1973); *United States* v. *Lanza,* 356 F. Supp. 27, 30 (M.D. Fla. 1973); *United States* v. *Mainello,* 345 F. Supp. 863, 873-874 (E.D. N.Y. 1972).

C. In their third ground for suppression, the defendants assail the government's compliance with the requirements for the submission of progress reports and the return and sealing of the wiretaps. On January 15, 1973, Judge Thomas F. Murphy issued the original wiretap order with a termination date of January 30, 1973. Under the provisions of 18 U.S.C. § 2518(8)(a), the government was obliged to return the recordings and to submit a progress report to Judge Murphy upon the expiration period of the order. On January 29, 1973, the government attempted to comply with the statute but Judge Murphy was not in his chambers. Thereupon, the agents requested Chief Judge T. Emmet Clarie to accept the progress report and the recordings for sealing. Judge Clarie contacted Judge Murphy by telephone and it was "agreed orally that the Court sitting here in Hartford should receive this progress report as of today and should also accept the return of the government as of today and seal the original tapes as submitted to the Court." Transcript of Hearing, Janury 29, 1973, pp. 7-8. Two days later, Judge Murphy entered an order ratifying the actions taken by Judge Clarie.

Under these circumstances there is no merit to the defendants' claim that the wiretap evidence must be suppressed because the return of the progress report and the recordings was accepted by Judge Clarie rather than Judge Murphy. Since Judge Murphy was unavailable, it was

proper for the government to seek the assistance of Judge Clarie in order to file a timely return under 2518(3)(a). Cf. *United States* v. *Poeta,* 455 F.2d 117, 122 (2 Cir.), cert. denied, 406 U.S. 948 (1972). In any event, even assuming a procedural error, suppression would be inappropriate. The integrity of the tapes is not questioned and the defendants have failed to demonstrate any prejudice from the purported violation of the statute. Cf. *United States* v. *Chavez,* 416 U.S. 562, 574-575 (1974); *United States* v. *Falcone,* supra; *United States* v. *Ianelli,* 477 F.2d 999, 1002 (3 Cir. 1973); *United States* v. *Poeta,* supra; *United States* v. *LaGorga,* 336 F. Supp. 190, 194 (W.D. Pa. 1971).

D. The defendants further contend they were not served with timely inventories in violation of 18 U.S.C. § 2518 (8)(d). That statute requires that, within a reasonable time but not later than 90 days after the termination of the period of the wiretap order "or extension thereof", the judge who issued the warrant shall cause an inventory notice to be served on each person named in the order and, in the discretion of the judge, on any other person whose conversation was intercepted.

Here the original wiretap order, naming defendants Valeriano, Brown and Furman, was issued by Judge Murphy on January 15, 1973, with a termination date on or before January 30, 1973. Thus, these defendants argue, the inventories should have been served on or before April 30, 1973. However, on April 25, 1973, in Judge Murphy's absence, Judge Newman authorized an extension of the original order and the service of the inventories until May 25, 1973. Three days prior to the termination date, Judge Murphy granted a further extension of the order and set July 16, 1973 as the final date for the service of the inven-

tories. The government served the notice inventories on these defendants on July 10, 1973.

Despite defendant's contentions, it seems clear that the government complied with the provisions of § 2518(8)(d). The statute specifically allows postponement of the service of notice as a result of extensions of the original wiretap order. Since the defendants received the notice inventories prior to the deadline date of July 16, 1973, the government was in full compliance with Judge Murphy's May 22, 1973 order. Cf. *United States* v. *Curreri,* 363 F. Supp. 430, 435-436 (D. Md. 1973). See also *United States* v. *Valeriano,* Magistrate's Docket No. 2 (D. Conn. November 20, 1973) (Newman, J.).

E. Defendants Kinsler, Bell, Amendola, and Adams, who were unnamed in the application and order but whose conversations were overheard during the interceptions, also argue non-compliance with § 2518(8)(d). The government concedes that these defendants did not receive full disclosure of all relevant documents and materials until July 3, 1974, two months after the indictment in this case was returned by a grand jury. However, it excuses the delay in service on the ground that these defendants were "unknown" at the time the wiretap application and order were filed and that, as soon as their identities were confirmed by investigative techniques, they received notice within a reasonable time.

The record before the Court supports the government's position. No evidence has been presented to indicate that defendants Kinsler, Bell, Amendola, and Adams were known to the government, within the meaning of Title III of the Act, so as to require disclosure of their names at the time

the wiretap orders were issued and extended by judges of this District during the first six months of 1973. In fact, as late as February 27, 1974, Agent Connolly informed the grand jury investigating this case that the government was awaiting the results of voice exemplars to establish the identities of certain persons suspected of being overheard, and specifically included these defendants within that category. Subsequently, Agent Connolly reported to the grand jury that the voice tests had been concluded and identifications made. Thereupon an indictment was returned on May 3, 1974. Under these circumstances, since probable cause concerning these defendants may properly be found to be lacking until the spring of 1974, the government was not derelict in failing to reveal their names to the judges who issued and extended the wiretap orders and who established dates for the service of notice inventories. See *United States* v. *Kahn,* 415 U.S. 143, 155 (1974); *United States* v. *Martinez,* 498 F.2d 464, 468 (6 Cir. 1974); *United States* v. *Tortorello,* 480 F.2d 764, 775 (2 Cir.), cert. denied, 414 U.S. 866 (1973); *United States* v. *Frizzell,* 400 F. Supp. 268, 271-272 (E.D. Tenn. 1975); *United States* v. *Chiarizio,* supra, 388 F. Supp. at 867-872.

In any event, even assuming these defendants failed to receive timely inventories, suppression of the evidence would be unwarranted. Not every failure to comply fully with the requirements of Title III renders the interception unlawful. *United States* v. *Chavez,* supra. Unlike the statutory requirement concerning authorization for a wiretap, see *United States* v. *Giordano,* 416 U.S. 505 (1974), it does not appear that a post-interception inventory is a central or functional safeguard under Title III which, if tardily furnished, mandates suppression. One of the main pur-

poses of the inventory procedure is to provide notice to those who have had their communications intercepted and to afford any aggrieved person the opportunity to pursue an appropriate remedy. Therefore, in the absence of a showing of prejudice, a failure to serve a timely notice does not require suppression. *United States* v. *Rizzo,* 492 F.2d 443, 447 (2 Cir.), cert. denied, 417 U.S. 944 (1974); *United States* v. *Wolk,* 466 F.2d 1143 (8 Cir. 1972); *United States* v. *Forlano,* 358 F. Supp. 56, 59 (S.D.N.Y. 1973). No prejudice has been demonstrated in the instant case. All relevant information, including a complete transcript of the intercepted conversations, has been made available to the defendants for the purposes of pre-trial motions and defenses at trial. Cf. *United States* v. *Cirillo,* 499 F.2d 872, 882-883 (2 Cir.), cert. denied, 419 U.S. 1056 (1974). Moreover, there has been no showing that the government deliberately ignored the notice requirements of the statute or that it failed to file inventories in order to gain a tactical advantage. *Compare United States* v. *Eastman,* 465 F.2d 1057 (3 Cir. 1972). To suppress the wiretap evidence under these circumstances "would be to unnecessarily undermine and subvert the legislation." *United States* v. *LaGorga,* supra, 336 F. Supp. at 194. See also *United States* v. *Doolittle,* 518 F.2d 500, aff'g 507 F.2d 1368, 1371-1372 (5 Cir. 1975).

F. Defendant Bell moves to suppress items seized in a search of his premises located at 23 West Street, New London, Connecticut, on the ground that the warrant was issued without probable cause for two reasons: (1) the informant named in the affidavit was not demonstrated to be "reliable"; and (2) the information obtained from the informant was "stale." The contentions are without merit. The affidavit not only contained a statement that the informant had previously supplied accurate information but also certified to independent corroboration of the informant's story. These factors are sufficient to sustain the constitutional propriety of the issuance of the warrant. *Aguilar* v. *Texas,* supra, 378 U.S. at 114; *United States* v. *Sultan,* supra, 463 F.2d at 1068-1069; *United States* v. *Dunnings,* supra, 425 F.2d at 839. Moreover, the underlying circumstances set forth in the affidavit did not suffer from staleness. The affidavit detailed the on-going, illegal business relationship between defendant Bell and defendant Valeriano, and described the doings of the criminal enterprise just a few days before the search. While it is true that probable cause dwindles with the passage of time when the affidavit refers to an isolated violation, the time element becomes less significant "where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct. . . ." *United States* v. *Johnson,* 461 F.2d 285, 287 (10 Cir. 1972); see also *United States* v. *Harris,* 482 F.2d 1115, 1119 (3 Cir. 1973); *United States* v. *Cantor,* 328 F. Supp. 561, 568 (E.D. Pa. 1971), aff'd, 470 F.2d 890 (3 Cir. 1972). Viewed in its entirety, the affidavit was sufficient to support the issuance of the search warrant.

C. Defendant Brown moves to suppress her testimony before the grand jury on October 10, 1973, claiming that at the time she was not fully apprised of her rights as required by *Miranda* v. *Arizona,* 384 U.S. 436 (1965) and its progeny. Since the government represents that none of the defendants' testimony before the grand jury will be used at trial, the motion is denied, without prejudice.

III. The Discovery Motions

A. With the exception of defendant Valeriano, all the defendants move for the disclosure of the minutes of the grand jury. Since the defendants have demonstrated no "particularized need", the motions are denied. Rule 6(e), F. R. Crim. P., *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 688 (1958); *United States* v. *Budzanoski,* 462 F.2d 443, 454 (3 Cir. 1972); cf. *United States* v. *Youngblood,* 379 F.2d 365 (2 Cir. 1967). In addition, the defendants' request for an *in camera* inspection of the grand jury minutes is denied, absent a showing that their *Estepa* claim possesses any substance. *United States* v. *Ramirez,* 482 F.2d 807, 812 (2 Cir.), cert. denied, 414 U.S. 1070 (1973).

B. The defendants' motions for bills of particulars are denied, except that the government shall answer the following requests:

Paragraph No. 7 under Count One;
Paragraphs Nos. 7 and 9 under Count Two;
Nos. 3 and 5 under Overt Acts.

C. The defendant Kinsler's supplemental motion for discovery and inspection is denied; the defendant's argument concerning the authority of the special strike force attorney to appear and present evidence in this case to the grand jury is foreclosed by the ruling of the Second Circuit in *In re Supoena of Sersico,* 522 F.2d 41 (2 Cir. 1975).

Accordingly, it is ordered as follows:

1. All motions to dismiss are denied.

2. All motions to suppress are denied.

3. The motions for disclosure of grand jury minutes are denied.

4. All motions for discovery and inspection are denied.

5. The motions for bill of particulars are denied, with the exceptions noted hereinbefore.

Dated at New Haven, Connecticut, this 17th day of February, 1976.

ROBERT C. ZAMPANO
United States District Judge

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AFTERNOON SESSION

(In the absence of the jury.)

THE COURT: Are the parties ready to proceed?

MR. CASEY: Yes, your Honor, government is ready.

THE COURT: In the absence of the jury.

MR. CASEY: The government would like to draw to the Court's attention in line with the arguments given earlier by the government the case of U.S. versus Falcone.

THE COURT: I am aware of it.

With respect to the two rulings, the Court will first rule on the motions directed to the lack of court order for the dial number recorder or pen register during the period January 17, '73 to January 27, '73.

At the outset, the Court finds no authority for a dismissal, even assuming the validity of the defendants' arguments. Actually, what the procedure would be is a motion to suppress either all the evidence taken as a result of the alleged illicit dial number recorder being placed on the phones, or I suppose it could be argued all the evidence taken during the period January 17, 1973 to January 27, 1973.

Even assuming arguendo that the arguments were valid, there would not be sufficient grounds to dismiss the case or the indictment. The government, I suppose, could attempt to put on a case without the evidence, if it wished, so what we really have is a motion to suppress, and I so interpret the motion presented

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prior to the luncheon hour.

The motion to suppress is denied for two basic reasons: One, it's certainly untimely. These materials were available

to the defendants certainly for a period of months, and maybe even years. Motions to suppress were presented to this Court and I believe Judge Newman over a period of two years, and they were ruled upon at great length, and certainly this ground should have been presented at that time. But even assuming for the sake of argument that the motion is to be regarded as not untimely, the Court finds there is authority to support the government's position.

While the Second Circuit has not directly ruled on this point, other courts have. Recently, the Second Circuit discussed the need of a court order for pen register, not in combination with a request for a wiretap, but I find that case is not applicable here. The cases that do support the government are U.S. versus Falcone, 505 Fed. 2nd, 478 and the discussion there in 481 through 483. That case seems to be directly on point. With respect to the precise issue before this Court. It's a Third Circuit case in which cert. was denied. Also, of course, Judge Blumenfeld's opinion in U.S. versus Barrone is somewhat close. I am not as familiar with all the facts in that case as in the case before me, or in the case of U.S. versus Falcone on this issue, but it does lend weight to government's position, and in the short time I had available to me, I found

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nothing to the contrary.

I take it, it goes without saying that it's not a good practice, that it is, of course, always more appropriate to spell out to the issuing judge that a pen register may be part of the electronic surveillance, but certainly it would seem to me a fortiori that if a judge issues authority to the monitoring agents to listen to a telephone conversation during certain periods of time, the court would automati-

cally grant a request to obtain the telephone numbers of outgoing calls without more.

So, as the government says, it does seem to be a case where the lesser is included in the greater, and I have to agree with the caveat that the government should really spell these matters out for the issuing judge so that if nothing else, the court will avoid this type of motion.

MR. CASEY: Not that it is germane to this point, but it is now the practice of the government to get both orders for both—

THE COURT: I know. When I am the issuing judge of late, I recall distinctly the government has asked for both. This case does go back a few years, so your exceptions are noted. The point is preserved for another forum, if that should become necessary.

MR. LASALA: I would like to make one remark for the record. Your Honor has ruled on that. Certainly, there could be argument, but since your Honor has ruled, I assume argument

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would serve no purpose.

For the record, since 1973, I have been involved in this case and I have paid attention to all the discovery and virtually the piles and piles of motions and papers that have been filed, and your Honor's reference to an untimely attack, I can state unequivocally that through all the motions and all the responses thereto, and all the disclosures, the government has taken the position that there were two separate orders: one for interception and one for pen register, and I would state it was not until the events of yesterday that I was aware that there was a pen register on my

client's phone from the 17th to the 27th, so consequently, I don't feel that it was an untimely motion on my part, because I had no knowledge before that was the case, based upon what the government put forth in its disclosure.

THE COURT: This has been practically an open file case and I cannot and will not accept that explanation. Judge Murphy's order was certainly available. The logs, the tapes and the various other materials were available to counsel, and it's up to counsel for the defendant to prepare its case—their case thoroughly and not rely on what might have been assumed.

But, in any event, your comments are noted for the record and will be available to another forum to weigh, but I, as the trial judge, just cannot accept that explanation.

MR. FRECHETTE: Would your Honor be kind enough to note the same comment by me? The first time I ever heard of this

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was yesterday morning.

THE COURT: Yes. I hasten to add that I do not—I do not wish my comments to reflect on credibility of counsel. I believe perhaps the first time you heard about it was yesterday. All I am saying is that diligent investigation and preparation would have brought these things to your attention earlier over the past two years if you took advantage of the materials that were available to you during that period of time.

Now, with respect to the transcripts, I am going to allow the government to use the transcripts, with cautionary instructions to the jury, but at this point I am not going to permit the transcripts into evidence. The government may renew its request at a later time. The transcripts will

be available to the jury. There has been no question about their correctness as transcriptions of what was said, but I think for the time being, since clearly the transcripts are only an aid to the jury, that the Court will only permit the transcripts to be used for that purpose and not as full exhibits. However, that's without prejudice.

Bring in the jury.

No. 76-1072

In the Supreme Court of the United States

OCTOBER TERM, 1976

DANIEL VALERIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the court of appeals was not recorded. The opinions of the district court (Pet. App. 1a, 16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1977. The petition for a writ of certiorari was filed on February 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a separate court order is required before the government may use a pen register in conjunction with a court authorized wire interception.

2. Whether 18 U.S.C. 2518(8)(d) permits a district court to postpone the time for service of inventory notice beyond 90 days, on a showing of good cause.

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of conspiring to conduct and conducting an illegal gambling business, in violation of 18 U.S.C. 371 and 1955. He was sentenced to two years' imprisonment on the substantive offense; his two year sentence on the conspiracy offense was suspended in favor of four years' probation. The court of appeals affirmed in an unrecorded oral opinion (Pet. 1-2).

The undisputed evidence shows that petitioner was a partner in a large numbers business and maintained the books for the operation (Tr. 692, 697, 743). Evidence of this illegal gambling business was derived primarily from a wire interception authorized by District Judge Murphy on January 15, 1973 (Govt. C.A. App. 21). The order authorized the monitoring of two telephones for a maximum of 15 days (*id.* at 24). The wire interception was conducted from January 16, 1973, to January 27, 1973, and in addition pen registers (devices that show the numbers dialed on the monitored telephones) were used on the two telephones during that period. On July 10, 1973, after two court-authorized postponements, inventory notice was served upon petitioner and others (Pet. 7, 8).

ARGUMENT

1. Petitioner contends (Pet. 13) that the government was required to obtain a separate court order before using pen registers in conjunction with the court authorized wire interception. Petitioner failed, however, to raise the issue prior to trial, as required by 18 U.S.C. 2518(10(a); the district court properly held that this failure was not excused,

and denied the mid-trial motion to suppress as untimely (Pet. App. 16a-17a, 19a). In any event, the contention is without merit.

In *United States* v. *Falcone*, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955, the court concluded that the use of a pen register to decipher outgoing numbers is comprehended within an order allowing the monitoring of telephone conversations and, accordingly, that an additional pen register order is not necessary. The court explained (*id.* at 482-483):

> The reasoning for this conclusion is based on an analysis of the operation of a pen register.
>
> A telephone number is only a symbol for a series of electrical impulses. When a telephone number is dialed from a wiretapped phone, the pen register and the tape recorder are activated simultaneously. Both record the dialing of the phone. And both can be used to determine the telephone number dialed. The pen register records the electrical impulse and automatically translates it back into the number dialed. The tape recorder records the aural manifestation of the electrical impulse which also discloses, if played at a slower speed and examined by an expert, the telephone number dialed. A pen register functions to facilitate the decipherment of the number dialed. It is a mechanical refinement which translates into a different language that which has been monitored already. Simply stated, the pen register avoids a mechanical step; it translates automatically and avoids the interpreter.

Therefore, no independent order authorizing use of pen registers was necessary, because they were properly used in

conjunction with a court authorized wire interception, as the district court correctly concluded (Pet. App. 17a-18a).[1]

2. Petitioner contends (Pet. 9) that evidence derived from the wire interception should have been suppressed because inventory notice was not served within 90 days from the termination of the intercept order.

Section 2518(8)(d) of Title 18 requires that within a reasonable time, but not later than 90 days after "the termination of the period of an [intercept] order," the issuing judge shall cause the service of an inventory notice, but allows that "[o]n an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory * * * may be postponed." In the instant case, the intercept order was issued on January 15, 1973, and expired on January 30, 1973; therefore, unless postponed, the 90-day period for service of inventory would have expired on April 30, 1973 (Pet. 7). However, the government requested and was granted two postponements, which extended the time for serving inventory notice until July 16, 1973. Notice was served on petitioner and others before that date (Pet. 8). Both postponements were granted because the district

[1]There is no need to hold this case pending the decision in *United States* v. *New York Telephone Co.*, No. 76-835, certiorari granted January 25, 1977. The court order involved in that case authorized the use of pen registers only, and, although based on ample probable cause, was not submitted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.* We contend that, whether or not the procedures of Title III are utilized, the telephone company may properly be required to assist in the installation of pen registers. Whether or not we are correct in this contention—and even if respondents there are correct in their assertion that orders authorizing the use of pen registers can be issued only after compliance with the procedural requirements of Title III—the use of a pen register here was a proper means of effectuating an interception authorized pursuant to Title III.

courts agreed with the government's representation that the service of notice upon the suspects at an earlier time would have frustrated the ongoing investigation (Govt. C.A. App. 41-55, 58, 62). Disruption of an "investigation [which] is still in progress" is one of the examples given in the legislative history as justification for a postponement of inventory notice. S. Rep. No. 1097, 90th Cong., 2d Sess. 105 (1968).

Petitioner's argument (Pet. 10) that Section 2518(8) (d) "imposes an absolute 90 day ceiling on inventory service" is refuted by the plain language of the statute. Moreover, the legislative history clearly demonstrates that the 90-day period was not intended to limit the discretion of the district court to grant postponements on a showing of good cause. The Senate Report recognized that in some interceptions touching on national security interests, "it might be expected that the period of postponement could be extended almost indefinitely." S. Rep. No. 1097, *supra*, at 105. While indefinite postponement was obviously not to be the rule, Congress plainly intended to give the district courts the discretion to adjust the inventory service date to the facts of each case, allowing postponement beyond the 90-day period, so long as "the principle of postuse notice [is] retained." *Ibid.* The government here was granted two extensions, because earlier notice would have frustrated the ongoing investigation. Petitioner does not claim that this reason failed to supply good cause for the postponements; indeed, he expressly concedes that in the absence of the postponements, the subsequent interceptions would have been futile (Pet. 11-12 n. 2).[2]

[2]Despite petitioner's argument to the contrary (Pet. 9-10, 11-12), suppression would not be required here even if the service of inventory notice had been late. See *United States* v. *Donovan*, No. 75-212, decided January 18, 1977, slip op. 23-24. In *Donovan*, the Court refused to comment upon the government's suggestion that "suppression might be

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1977.

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required if the agents knew before the interception that no inventory would be served." Slip op. 24, n. 26. We had noted in our brief in *Donovan* (p. 49 n. 40) that such knowledge on the part of the agents conducting the intercept "might affect the way in which the interception was conducted." Petitioner's suggestion that the Court should reach that question in this case because "the Government may well have already intended [from the outset] to request extensions to file an inventory beyond 90 days" (Pet. 12) is without merit. Contrary to the situation where the agents know from the outset that the interception will remain a secret because no inventory will be served, knowledge that inventory may be postponed could not affect the way the intercept is conducted.